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No. 92-1286

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

Cheyenne-Arapaho Tribes of Oklahoma,

Petitioner,

vs.

Woods Petroleum Corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Respondent Woods Petroleum Corporation's Brief In Opposition to the Cheyenne-Arapaho Tribes of Oklahoma's Petition for Writ of Certiorari

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RESPONDENT WOODS PETROLEUM CORPORATION'S BRIEF IN OPPOSITION TO THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA'S PETITION FOR WRIT OF CERTIORARI

Respondent Woods Petroleum Corporation (``Woods´´)[1] submits this brief in opposition to the Petition for Writ of Certiorari (the ``Tribes´ Petition´´) filed by petitioner, Cheyenne-Arapaho Tribes of Oklahoma (the ``Tribes´´).[2]

[1]Woods has been renamed Woods Research and Development Corporation, a wholly-owned subsidiary of Sunshine Mining Company. Woods has no subsidiaries.

[2]The Tribes' Petition is related to and arises out of the same case below as the Petition for Writ of Certiorari filed by Woods on December 7, 1992, styled: *Woods Petroleum Corp. v. Cheyenne-Arapaho Tribes of Oklahoma*, No. 92-970. *See* Tribes' Petition at 9 n.11.

COUNTERSTATEMENT OF THE CASE[3]

The Tribes filed the action below in 1986, seeking judicial review of administrative orders approving two plans of communitized development affecting six, 160-acre federally approved Indian leases. Four of those leases reached their five-year anniversary of federal approval on May 10, 1982 (the ``Woods Leases''). Prior to that date, each of these leases was communitized within one of two, 640-acre drilling and spacing units established by the Oklahoma Corporation Commission and approved by the Secretary of Interior. During 1982, unit wells in each of the communitized units actually began producing oil and gas in paying quantities.

On judicial review by the district court from an adverse ruling by the Department of the Interior, the Tribes for the first time raised what they now define as the ``MLA issue.''[4] Tribes' Petition at 7. By the MLA issue, the Tribes requested that the district court find that all the Woods Leases had expired five years from the date of federal approval, irrespective of actual drilling of unit wells in each of the two communitized units. The core of the MLA issue was the Tribes' assertion that the combination of a five-year primary

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[3]A complete statement of the case below may be found in Wood's Petition For Writ of Certiorari. *See* n.1, *supra*. The ``Parties To The Proceeding'' and ``Reference To Opinions Rendered By Courts and Agencies'' cited therein are applicable here.

[4]Despite the fact that the MLA issue had not been raised at any time during the Tribes' administrative appeal, the district court undertook review of this issue, citing *Frontier Airlines v. Civil Aeronautics Bd.*, 621 F.2d 369, 371 (10th Cir. 1980). App. at 64.

term *and* a ``commencement of drilling'' clause[5] in the Woods Leases conflicted with the ten (10) year limitation imposed on the primary terms of Indian leases by the Indian Mineral Leasing Act, 25 U.S.C. § 396a (the ``MLA'').

The district court rejected the Tribes' MLA issue concluding that the Woods Leases could not violate the ten year term limitation of the MLA. The district court then granted summary judgment in favor of Woods and against the Tribes on the MLA issue.[6]

The Tribes perfected a cross-appeal of the district court's order presenting the MLA issue to the Court of Appeals for the Tenth Circuit. Tribes' Petition at 9-10. The Court of Appeals declined to address the MLA issue, allowing the district court order to stand. App. at 3-22. The Tribes urged rehearing on the MLA issue and, again, the Court of Appeals declined to alter the district court's ruling. *Id.* at 1. The Tribes' Petition followed.

REASONS FOR DENYING THE WRIT

This Court has expressly limited grants of certiorari to those instances presenting ``special and important reasons therefor.'' Sup. Ct. R. 10.1. The Tribes' attempts to

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[5]As noted by the district court, this clause provides in part:

> If the lessee shall commence to drill a well within the term of this lease, the lessee shall have the right to drill such well to completion with reasonable diligence and if oil or gas or either of them be found in paying quantities this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

App. at 65.

[6]The district court concluded that there was no conflict between the Woods Leases and the MLA because production of oil or gas was achieved ``in less than ten years after the leases were initially approved. Accordingly, if 25 U.S.C. § 396a is read simply to bar any leases that remain unproductive for more than ten years, these leases are not barred by the statute. Production was achieved prior to the maximum period.'' App. at 66.

fabricate such reasons here are transparent and should be rejected.[7]

I. A PLAIN READING OF THE STATUTE BARS THE TRIBES' ARGUMENT

The Tribes argue that Section 396a of the MLA invalidates the commencement of drilling clause contained in the Woods Leases. This statute provides:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of sections 396a to 396g of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, *for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.*

25 U.S.C. § 396a (emphasis added).

Section 396a imposes a maximum limit (ten years) on the period of time Indian mineral interests may be burdened by an existing mineral lease, yet remain unproductive. This limitation effectuates the express congressional purpose of the MLA to secure for Indian mineral owners the greatest return from their property. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597 (9th Cir. 1984), *aff'd*, 471 U.S. 195, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985). The

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[7]Rule 10.1, while not exhaustive, indicates the character of reasons that are of sufficient gravity to warrant this Court's consideration. The Tribes do not even attempt to contend that the MLA issue falls within these recognized categories for judicial review.

Tribes ignore this rational reading of the statute and assert that Section 396a in fact mandates not lease-term length, but that it mandates the specific *form* that a lease term must take.

The term of any Indian lease is divided into two (2) distinct portions. To allow evaluation and drilling, there is an initial period in which the lease is preserved without production, and a subsequent period requiring production and preserving the lease so long as that production continues.

By Section 396a, the initial, non-productive period of Indian leases is statutorily limited to no more than ten (10) years. Section 396a does not, however, require that the non-productive term of an Indian lease be defined only as a fixed number of years. There is nothing within the plain meaning of the statute that in any way restricts *how* the Secretary must define a lease's non-productive period. To the contrary, the statute mandates only that the term not "*exceed* ten years and as long thereafter as minerals are produced in paying quantities."[8] *Id.* (emphasis added).

In the Woods Leases, the non-productive, initial period is measured by a combination of a five-year fixed period, plus a period of diligent drilling activity (if that drilling is commenced within the fixed five-year portion of the term). The Tribes, however, contend that the non-productive period can only be measured by a fixed number of years and *never* by the time of drilling activity. Apparently, the Tribes would claim invalidity of an Indian mineral lease whose non-productive term was fixed at one year, plus the time to diligently complete a well commenced within that one year period, notwithstanding the fact that the actual term would be far shorter than the ten-year limit imposed by Section 396a.

The Tribes have urged a construction of the MLA that would prohibit the use of commencement of drilling clauses (a provision used in mineral leases for over 75 years),

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[8]Here, of course, both unit wells commenced commercial production in 1982, within six years of approval of the Woods Leases by the Secretary and well within the ten-year limit imposed by 396a.

notwithstanding that the time in which actual production is established would fall well within the statutory ten-year limit. Such a construction ignores the plain language of the statute, ignores legal and industry history, and simply defies logic. The courts below rejected this construction outright. No ''special or important reason'' now exists for further review of this argument on certiorari.[9]

II. NO CONFLICT WITH CONGRESSIONAL INTENT IS CREATED BY THE RULINGS BELOW

A. No Clear Congressional Intent Exists

As in the courts below, the Tribes urge here that rejection of their MLA issue creates a conflict with congressional intent in enacting Section 396a of the MLA. Tribes' Petition at 12-20. This entire argument is based on the Tribes' skewed version of the state of the law in 1924, the year of enactment of the MLA. In rejecting the Tribes' argument, the district court specifically found that this ''account of the prevailing interpretative rule in 1924 . . . is misleading.'' App. at 66. It remains so here.

In the courts below, and now to this Court, the Tribes represent that when Congress enacted Section 396a of the MLA, it intended to preclude the validity of a ''commencement of drilling'' clause in Indian leases. Such representations simply ignore the fact that, by 1924, several courts had ruled that the express language of

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[9]Because production here was established well within the statutory ten-year limit, the Tribes' argument presents, at best, no more than an abstract, academic conflict. Under such circumstances, certiorari is properly denied. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955). (''Special and important reasons' imply a reach to a problem beyond the academic or episodic.''). *Id.*

``commencement of drilling'' clauses superseded a strict interpretation of the primary term requirements of the habendum clauses in mineral leases.[10] This, the district court concluded, prevented a finding of clear congressional intent inconsistent with the ``commencement of drilling'' clauses contained in the Woods Leases. *Id.* at 68. Because no clear line of authority existed in 1924 as to this issue, the Tribes are simply in error in asserting that there exists an unambiguous congressional intent in the enactment of Section 396a. Absent such a clear intent, the Tribes' assertions of a conflict therewith are meritless.[11]

B. The Rulings Below Are Fully Supported By Existing Law

More importantly, no special or important question is presented by the Tribes' Petition because the rulings below

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[10]The misleading nature of the Tribe's representation was explained by the district court stating:

> [A]s of 1924 (the determinative date under the Tribe's argument) each interpretive approach had been adopted by a number of courts. Contrary to the Tribes' suggestions, the provisions of the MLA do not indicate the approach to be followed in interpreting a lease of unallotted lands.

App. at 67 (citing, *inter alia, Lester v. Mid-South Oil Co.*, 296 F. 661 (6th Cir. 1924); *De Flores v. Smith*, 236 S.W. 505 (Tex. Ct. App. 1921); *Texas Co. v. Curry*, 229 S.W. 643 (Tex. Ct. App. 1921)).

[11]The Tribes' argument is rendered even more specious by the history of the MLA after 1924. The propriety of commencement of drilling clauses was addressed and affirmed subsequent to the original version of Section 396a as well. In addressing mineral leases in Oklahoma, the Oklahoma Supreme Court ruled that commencement of drilling clauses modified the fixed-year portions of mineral lease terms. *Simons v. McDaniel*, 154 Okla. 168, 7 P.2d 419, 420 (1932). Subsequently, in 1938, Congress specifically reviewed and modified Section 396a, choosing not to adopt additional language that would have implemented the construction urged by the Tribes here. Tribes' Petition at 12-13.

are fully supported by the law, including the very authorities cited by the Tribes. The district court correctly analyzed the applicable legal principle stating:

> [I]n *Moncrief v. Pasotex Products Co.*, 280 F.2d 235 (10th Cir. 1960), *cert. den.*, 364 U.S. 912 (1960), in interpreting the provisions of an oil and gas lease on Indian land in Oklahoma, the Tenth Circuit concluded that the approach taken in Oklahoma, Texas and Montana ... should be applied. In *Moncrief*, the lessee commenced the drilling of a well during the leases' primary term but did not achieve production by the end of that term. The Court found that ``[t]he lessee's right to commence a well during the [leases'] primary term carries with it, by necessary legal implication, the right to complete the well after expiration of the primary term unless negatived by contract terms or loss by abandonment.'' ...
>
> ... The Court finds *Moncrief* directly applicable to the instant case. Since the Tenth Circuit there concluded that, standing alone, the right to commence the drilling of a well within a lease's primary term implicitly includes the right to complete the well after the primary term has expired, there is all the more reason to conclude that the lessee has such a right when the lease in

> question expressly grants that right by means of a commence drilling clause.

App. at 68-69.[12] This conclusion has also been endorsed by the very commentators relied upon by the Tribes.

Professor Kuntz has noted:

> The continuous drilling clause is the product of adverse decisions in some jurisdictions and uncertainty in others with respect to the rights of the lessee who commenced a well during the primary term but who has not established production and is still drilling upon expiration of the primary term. . . . . *It is designed to assure the lessee of the right to complete a well which he began in the primary term and to provide that if such well produces oil or gas in paying quantities it will satisfy the habendum clause. It may appear as a separate clause, or it may appear as additional language in the habendum clause.* . . .

2 Kuntz, *Oil & Gas* § 26.13 at 411-12 (1989) (emphasis added) (footnotes omitted). Professor Kuntz concludes that ``it is probably not accurate to describe the effect of continuous drilling as an extension of the lease. The lease is probably not extended for all purposes, but the lessee is permitted to continue operations for the sole purpose of completing the drilling operation; and if such drilling operation results in production, it will relate back to the time

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[12]The Tribes' attempt to distinguish *Moncrief* simply ignores the legal principle of that case. Petition at 17-18 n.15. In *Moncrief* the Tenth Circuit found that a necessary legal implication of the right to drill a well under an Indian mineral lease was the right to complete that well *and* preserve the lease. *Id.*, 280 F.2d at 237. This longstanding principle of oil and gas law was simply applied by the district court here in concluding that the interpretation of Section 396a of the MLA imposed by the Tribes in order to fabricate a ``conflict,'' was illogical. App. at 68.

that the drilling began.'' *Id.*, § 26.13 at 410. Because Professor Kuntz makes this observation with regard to the implied extension of the right to complete a well under leases that do not have express commencement of drilling clauses, his conclusion is even more compelling with regard to leases, such as the Woods Leases, that expressly state that the effect of well completion is that the ''lease shall continue and be in force with like effect as if such well had been completed within the [primary] term.'' App. at 65.

Professor Summers has also rejected the Tribes' position, asserting that the argument as to whether a habendum clause *impliedly* prevents the completion of a well commenced during the primary term of the lease is no longer a burning controversy ''for the reason that [modern] leases *expressly* provide[ ] for their extension by the completion of a well commenced within the primary term.'' 2 Summers, *Oil & Gas* § 303 at 310-12 (1950) (emphasis added) (footnotes omitted). Thus, the Tribes' attempt to assert an outdated argument in an inapplicable situation creates no issue worthy of review here.[13]

III. AN EXERCISE OF THIS COURT'S SUPERVISORY AUTHORITY IS NOT WARRANTED

The actions of the Court of Appeals in not expressly overruling the district court's order granting Wood's summary judgment on the MLA issue, and in denying rehearing, was to leave standing that order. In issuing its ruling, the Court of Appeals: (1) expressly acknowledged the

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[13]Acceptance of the Tribes' ''misleading'' analysis would, of course, invalidate literally thousands of leases issued and developed in reliance upon the reasonable understanding that the Secretary's form lease properly implements the requirements of the MLA. As the district court correctly held, the agency's long-standing regulatory and leasing scheme has properly implemented those requirements.

existence of the Tribes' cross-appeal (App. at 10-11); (2) analyzed that its opinion would ``effectively dispose of this action'' (*i.d.* at 11); and (3) concluded that ``the leases upon which drilling had not *commenced* as of May 10, 1981 expired on that date.'' *Id.* at 22 (emphasis added). Thus, by necessary implication, the Court of Appeals ruled that those leases on which drilling had commenced ``as of May 10, 1981,'' had not expired. Such a ruling by implication is no less a ruling. *See, e.g., Byrne v. Byrne*, 398 S.W.2d 432 (Tex. Ct. App. 1965); *Bozeman Mortuary Ass'n v. Fairchild*, 253 Ky. 74, 68 S.W.2d 756 (1934). *See also* 4 C.J.S. *Appeal and Error* § 95(c) (1957) at 276.

The district court correctly analyzed the MLA issue and decided it adversely to the Tribes. The Court of Appeals undeniably decided that further review was not warranted. App. at 1. The simple fact that the Tribes disagree with those rulings does not, as the Tribes suggest, mandate an ``exercise of this Court's supervisory power.'' Tribes' Petition at 21. [14]

CONCLUSION

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[14]Finally, the Tribes' request for this Court to grant a writ of certiorari in order to 'provide the Secretary with guidance' in the promulgation of proposed regulations is improper as well. Tribes' Petition at 10-11. Such requests for a prospective, advisory opinion have consistently been rejected by this Court. *See Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). To the contrary, courts have consistently recognized the necessity of judicial deference to congressionally delegated administrative authority in the promulgation of regulations within their areas of expertise. *See, e.g., Office of Communication of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1422 (D.C. Cir. 1983); *Columbia Gas Transmission Corp. v. F.P.C.*, 530 F.2d 1056, 1059 (D.C. Cir. 1976). Moreover, the Secretary sought input into the administrative process of the promulgation of these proposed regulations from all interested parties, including the Tribes. *See* 56 Fed. Reg. 58735 (Nov. 21, 1991).

Because no ''special or important'' reason is presented by the Tribes' Petition for Writ of Certiorari, the Tribes' Petition should be denied.[15]

Respectfully submitted,

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[15]If the Court concludes that review of the Tribes' Petition is warranted, Woods respectfully requests that the Court grant Wood's Petition for Writ of Certiorari as well, in order to review all appellate issues presented in this action.